

STATE OF MICHIGAN
COURT OF APPEALS

DALE ANDREW ULRICH, VICKI SUE
ULRICH, and KYLE ROBERT ULRICH,

UNPUBLISHED
April 14, 2005

Plaintiffs-Appellees,

v

DEPARTMENT OF TRANSPORTATION,

No. 252525
Court of Claims
LC No. 02-000195-MD

Defendant-Appellant.

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right an order denying its motion for summary disposition on the ground of governmental immunity, MCL 691.1402(1). We reverse and remand.

Plaintiffs' claim arises from a one-car accident that they averred was caused by defendant's failure to "maintain the freeway in reasonable, safe repair so that it is reasonably safe and convenient for public travel." Specifically, vegetation and dirt accumulated along the shoulder of the highway allowed water to pool on the traveled portion which caused their vehicle to hydroplane out of control. The issue is whether these conditions fall within the highway exception to governmental immunity, MCL 691.1402(1).

In *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 160, 161-162; 615 NW2d 702 (2000), our Supreme Court held that, under the highway exception, a governmental agency has a duty to keep the "improved portion of the highway designed for vehicular travel" in reasonable repair, i.e., suitable for vehicle travel. In *Gregg v State Hwy Dept*, 435 Mich 307, 314-316; 458 NW2d 619 (1990), it was determined that the shoulder of a roadway is an "improved portion of the highway designed for vehicular travel." See, also, *Soule v Macomb Co Bd of Rd Comm's*, 196 Mich App 235, 237; 492 NW2d 783 (1992). However, the highway exception does not impose a duty on governmental agencies to ensure that the highway is *designed* for safe travel. See *Hanson v Mecosta Co Rd Comm's*, 465 Mich 492, 503-504; 638 NW2d 396 (2002).

Here, plaintiffs averred that lax maintenance—"not mowing, cutting or digging away the growth [of] vegetation on the roadbed, together with accumulated sand and gravel debris"—allowed vegetation and debris near the edge of the road surface to create a drainage barrier, which caused water to pool on the roadway. But, this theory of liability is not premised on an actual road defect, it is premised on a claimed design defect that allowed water to collect. The

allegedly dangerous and defective condition that caused plaintiffs' damages was the accumulation of water on the roadway, not a defect in the roadbed itself. Water on the roadway is a design issue because it is controlled by design factors, such as the elevation of the road and its substructure, the graded angle of the road surface, the width of the shoulder (which determines how closely vegetation will grow near the paved surface), and how much rainfall per hour the road is designed to handle. Accordingly, the highway exception to governmental immunity is inapplicable and plaintiffs' claim was properly dismissed.

Reversed and remanded for entry of an order granting defendant's motion for summary disposition. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Hilda R. Gage